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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 263

MAAS & WALDSTEIN COMPANY, *Petitioner*,
vs.
THE UNITED STATES OF AMERICA, *Respondent*.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR PETITIONER

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OPINION BELOW

The opinion of the court below is reported in 68 Court of Claims Reports 613 and 37 Fed. (2d) 196.

JURISDICTION

The judgment to be reviewed was originally entered by the Court of Claims December 9, 1929. (R. 30). The petitioner moved for a new trial, which motion was sub-

mitted February 6, 1930, and denied April 7, 1930, (R. 30). Petition for writ of certiorari was filed July 7, 1930 (R. 31). Jurisdiction to issue the writ was conferred on this Court by 28 U. S. C. A. Par. 288, as amended February 13, 1925, 43 Stat. 939. The writ was granted October 13, 1930.

STATEMENT OF FACTS

The petition to the Court of Claims requested interest on an overpayment of income tax in the amount of $2,476.23 for the year 1916 and on an overpayment of income and excess profits taxes in the amount of $462,038.34 for the year 1917 (R. 1). The Court of Claims held that the petitioner was entitled to interest on $1,731.50 of the 1916 overpayment and was entitled to no interest on the 1917 overpayment (R. 25). The petitioner subsequently abandoned its claim for interest on the remainder of the 1916 overpayment. Therefore, the facts set forth in this brief will relate only to the petitioner's claim for interest on the 1917 overpayment, as that is the only question now in dispute.

Petitioner filed it corporation income and excess profits tax return for the year 1917 on March 28, 1918, showing a total tax due thereon of $1,508,400.25. This tax was paid on June 20, 1918 (R. 20). Petitioner attached to its tax returns for the year 1917 a letter dated March 28, 1918, in which petitioner set forth its reasons why the tax should be computed under the provisions of articles 52, 18 and 24, regulations 41, revenue act of 1917 the (so-called "special relief" provisions) (R. 21). At the time the petitioner paid its 1917 income and excess profits taxes it forwarded to the Collector of Internal Revenue a letter reiterating its application for special relief (R. 21). On December 30, 1921 the petitioner filed with the Collector of Internal Revenue for the Second District of New York a claim for refund of $462,287.07 income and excess profits taxes overpaid for the year 1917 (R. 21). On April 15, 1922 the Commissioner approved the schedule of overassessments which included

an overassessment of income and excess profits taxes in favor of petitioner in the sum of $462,038.34 for the year 1917 (R. 22). This overassessment resulted from the granting by the Commissioner of Internal Revenue of the petitioner's prior request for special relief under the provisions of section 210 of the revenue act of 1917 and articles 18, 24 and 52 of regulations 41. (See Taxpayer's Exhibit No. 7—R. 13). The Collector of Internal Revenue credited part of the overpayment of 1917 taxes in the sum of $462,038.34 against an underpayment of the munitions manufacturers' tax in the sum of $8,642.16 for the year 1917 leaving an amount to be refunded in the sum of $453,396.18 (R. 23). The schedule of refunds for the refunding of $453,396.18 was signed by the Commissioner of Internal Revenue on May 9, 1922, and a warrant for this amount was thereafter issued to the petitioner (R. 24).

The Commissioner of Internal Revenue subsequently determined that the petitioner's munitions manufacturers' tax for the year 1917 had been overpaid by the amount of $20,520.00 and signed a schedule refunding that amount to the petitioner under date of August 3, 1922 (R. 24). Under date of June 14, 1922, the Commissioner of Internal Revenue mailed a letter to the petitioner advising that a re-examination of petitioner's income and excess profits tax returns for the year 1917 disclosed that the tax for that year had been underpaid by $4,696.97 and in August, 1922, made an additional assessment against the petitioner for the said year in the sum of $4,696.97 (R. 24). Therefore, the net overpayment of income and excess profits taxes for the year 1917 amounted to $457,341.37 ($462,038.34 less $4,696.97). The Commissioner of Internal Revenue refused to allow any interest on this refund (R. 24). The petitioner thereupon petitioned the Court of Claims to allow interest on this amount of $457,341.37, but the Court of Claims denied this claim.

QUESTION

The question is whether petitioner is entitled to interest on the refund of $457,341.37 under the provisions of Section 1324, (a) (1) of the Revenue Act of 1921.

Section 1324 (a) (1) reads as follows:

> "Section 1324 (a). That upon the allowance of a claim for the refund of or credit for internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of 1 per centum per month to the date of such allowance, as follows: (1) if such amount was paid under a specific protest setting forth in detail the basis of and reasons for such protest, from the time when such tax was paid."

In the court below the petitioner originally raised the point that even if it had filed no specific protest, the request for special assessment amounted to an informal claim for refund and that therefore, in any event, the petitioner was entitled to interest from six months after the date of filing such claim to the date of the allowance of the claim. This point was based on sub-section (a) (3) of Section 1324, which reads as follows:

> "Section 1324 (a). That upon the allowance of a claim for the refund of or credit for internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of 1 per centum per month to the date of such allowance as follows: * * *
>
> "(3) if no protest was made and the tax was not paid pursuant to an additional assessment, from six months after the date of filing of such claim for refund or credit." * * *

The petitioner is not pressing this alternative suggestion before this court, and is resting its claim for interest solely

on the proposition that a specific protest was made by the petitioner and it is therefore entitled to interest under the provisions of section 1324 (a) (1) of the Revenue Act of 1921. The petitioner does not rely on section 1324 (a) (3). In considering the opinion of the Court of Claims it is necessary to keep this in mind, because the Court of Claims devotes a portion of its opinion to disposing of the question as to whether the application for special relief amounted to a claim for refund. It must not be forgotten, however, that an actual formal claim for refund was filed by the taxpayer after the payment of the tax. (See Finding No. XI; R. 21.)

OPINION OF COURT OF CLAIMS

An analysis of the Court of Claims' opinion, which is adverse to petitioner's contention, shows that it is based on two main propositions:

1. The taxpayer did not make a sufficient protest under section 1324 (a);

2. Congress did not intend under section 1324 (a) to allow any interest on a refund where that refund was based on the application of the so-called "special relief" provisions of Section 210 of the Revenue Act of 1917.

POINT I

The Court of Claims erred in holding that petitioner made no specific protest.

Prior to and in connection with the payment of its 1917 tax, the petitioner addressed to the Commissioner of Internal Revenue three letters dated February 5, 1918 (R. 7), March 28, 1918 (R. 8), and June 14, 1918 (R. 10). The letter of March 28, 1918, contained the following:

> "Our net income for the taxable year was $2,656,-395.01. We are therefore required to pay in the above taxes substantially 66% of our net income. Of the total amount of the Excess Profits Tax, substantially

83% is assessed at the 60% rate, in addition to which we are required to pay over $242,000 for the Munitions Manufacturers' Tax.

"It is our opinion that our tax is proportionately larger than that of other representative concerns in the same line of business. It is our further opinion that this disproportion arises from causes of the nature of those specified in Article 52, of Regulations No. 41, for the following reasons:

"1. Under paragraph 3, Article 52, it is our belief that through the simple form and manner of our organization we are placed at a disadvantage in comparison with representative concerns in a similar trade or business. In accordance with the regulations applying to Excess Profits Tax Returns, we have reduced the value of the tangible assets acquired at the time of our organization to $100,000. No proper evidence of the actual value of these assets when acquired by the corporation is now in existence, but it is our opinion that their actual value was far in excess of $100,000. By reason of our organization, it has been possible to make our return in strict accord with the law and the regulations. We believe that this fact places us at a disadvantage with concerns which, by reason of the manner of their organization, and by reason of reorganizations through which they may have passed, are not able to correct their capital account in the manner provided in the regulations.

"2. Under paragraph 4, Article 52, our invested capital, when computed in the manner specified in the regulations, is manifestly seriously disproportionate to the taxable income. This arises in part for the reasons specified in the preceding paragraph, and in part for the reason specified under (b) in paragraph 4. About 90% of our total net income was earned through the operation of our gun cotton plant. This plant was erected solely for war purposes to meet the needs of a foreign government and will not be wanted for the purpose of our trade or business after the termination of the war. Under the regulations it has not been possible to properly allow for the amortization and exceptional depreciation of this plant.

"Upon the above statement, which we are prepared to support and amplify if required, we request assessment in the manner provided for in Article 52, referring also to Articles 18 and 24, Regulations No. 41."

The letter of June 14, 1918 which was addressed to the Collector of Internal Revenue at New York read in part as follows:

> "Dear Sir:
>
> Enclosed you will please find check which is tendered in accordance with notices of assessment received.
>
> Together with our returns for corporation income tax, excess profits tax, and munitions tax, we filed a request dated May 28th, for assessment in the manner provided for in Article 52, referring also to Articles 18 and 24, Regulations 41.
>
> Understanding that these questions will be passed upon at a later date, we shall be pleased to be advised that a hearing will be granted to us" (R. 10).

Did the foregoing letters constitute a specific protest within the meaning of section 1324 (a) (1)?

The word "protest" is defined in Funk & Wagnall's New Standard Dictionary as:

> "A declartion of dissent from an act done or about to be done, made to prevent the inference that by such act the declarant has relinquished a debt or *accepted a liability.*"

In Webster's Dictionary it is said:

> "A protest is a solemn declaration of opinion."

The obvious purpose of the taxpayer's letters, above quoted, was to prevent the inference that by paying the maximum tax the taxpayer accepted liability for such maximum tax,—which brings the letters within the Funk & Wagnall's definition of a protest. The taxpayer's letters certainly constituted a solemn declaration of opinion that an adjustment should be made by the Commissioner under the discretionary provisions of Section 210—thus coming within the definition given in Webster's Dictionary.

The Revenue Act of 1917 imposed a war excess profits tax at certain rates (Sec. 201) based on the taxpayer's invested capital (Sec. 207). Rules for the computation of such tax were laid down in the Act (Secs. 201 and 207) and amplified in Regulations 41 interpreting the statute. All taxpayers were compelled to make their returns and pay the tax on the basis of the statute as so interpreted by the Regulations.

The tax paid at the time of filing the return might be excessive either because

(a) The regulations improperly interpreted the statute, or

(b) The taxpayer might be one of a limited class of taxpayers who were entitled to a lower tax rate than that imposed by Sections 201 and 207.

The limited class of taxpayers referred to were those specified in Section 210 whose invested capital could not be satisfactorily determined by the Commissioner of Internal Revenue. Section 210 of the Revenue Act of 1917 gives a right to such limited class of taxpayers to have their taxes computed with reference to the tax of comparative corporations, since because of facts peculiar to them, their tax would otherwise be unduly in excess of the tax imposed on corporations under that Act.

In order to permit the Commissioner of Internal Revenue to determine whether the taxpayer comes within the limited class referred to and to facilitate comparison with other corporations the Commissioner provided in Regulations 41 that the taxpayer should first make a return as otherwise provided for and submit therewith a statement of reasons why in his opinion the tax should be assessed in accordance with this article. (Article 24 dealing with Section 210.)

Article 52 of the same regulations defines what the factors are which bring corporations within the limited class referred to.

Webster's definition of a protest as "solemn declaration of opinion" is particularly interesting, in view of the instructions to taxpayers contained in article 24 of regulations 41, the last paragraph of which reads (italics ours):

"In every case of a trade or business having invested capital a return shall be made in the first instance in accordance with Article 21 or 23, but the taxpayer may submit therewith a statement of reasons why *in his opinion* the tax should be assessed in accordance with this article."

It is obvious that a protest need not contain the word "protest" or "objection" and this court has, in effect, so held. In *Greenport Basin & Construction Co. v. U. S.*, 260 U. S. 512, a claim for abatement filed before payment of the tax was recognized as a valid protest. A claim for abatement (Treasury Department Form 843) nowhere contains the word "protest" or "objection." (See Exhibit A attached hereto.) Nor does it contain any statement that the assessment is illegal. It is, in fact, interesting to note that the language used is substantially identical with that used by the petitioner in this case. Line 4 of Form 843 (claim for abatement) reads: "Reduction of Tax hereby *Requested.*" (Italics ours.) This is the exact word which the petitioner used and to which the Government is now objecting.

In its letter of March 28, 1918 (R. 8) the petitioner said in part (italics ours):

"Upon the above statement which we are prepared to support and amplify if required, we *request* assessment in the manner provided for in Article 52, referring also to Articles 18 and 24, Regulations No. 41."

It is a well-settled rule that where a taxpayer protests prior to the payment of the tax, it is not necessary that he repeat that protest at the time of paying the tax, in the absence of an acquiescence by the taxpayer prior to the date of payment.

In the case of *Hecht v. Malley* (276 Fed. 830). (2 Am. Fed. Tax Repts. 1564) decided December 3, 1921, the Court said:

"The only other question is whether the tax paid on July 26, 1919, amounting to $1,193 cannot be recov-

ered, because it does not explicitly appear that a formal protest was made at the time of payment. The plaintiff had made three previous payments that year of the same kind of tax, and in each instance had made a formal protest on the ground that it was not liable to the tax. Whether by oversight the plaintiff failed to file a written protest with his last and largest payment, or whether he did so and the protest and the evidence of it have been lost, is hard to say. It is not necessary to make a finding upon it. *There can be no doubt that the collector knew the plaintiff's position on the matter, viz., that he objected to the tax on the ground that the Hecht Trust was not liable to it, and paid only because he felt compelled to do so under the demand made upon him.*" * * * (Italics ours.)

The decision of the District Court was reversed on another point by the Circuit Court of Appeals (281 Fed. 363) (2 Am. Fed. Tax Repts. 1710). The decision of the Circuit Court of Appeals was in turn reversed in part by this Court (265 U. S. 144) (4 Am. Fed. Tax Repts. 3976). However, that part of the decision of the District Court set forth above was not reversed by either the Circuit Court of Appeals or this Court.

Certainly, the collector knew that this claimant objected to the excess profits tax computed under Sections 201 and 207 of the Revenue Act of 1917 and paid it only because it felt compelled to do so under the demand of the Collector.

The Court in the cases of *Greensport Basin & Construction Co. v. United States* (*supra*) and *Young v. United States* (269 Fed. 58) (2 Am. Fed. Tax Repts. 1289), decided November 18, 1920, held that where the taxpayer had filed a claim for abatement of the taxes, it was not necessary to protest at the time of actual payment. In that decision which was sustained by this Court (260 U. S. 512) (3 Am. Fed. Tax Repts. 3189), the Court said:

"Even if it were necessary to plead duress or protest, the petition or complaint sets forth that the defendant computed the tax under compulsion of the regulations and filed a claim for abatement of the taxes

assessed before payment. This complies with every requisite of a payment under protest. Chesebrough v. U. S., 192 U. S. 253, 24 Sup. Ct. 262, 48 L. Ed. 432; City of Philadelphia v. Collector, 5 Wall. 720, 18 L. Ed. 614. The Government urges that it is necessary to make a protest at the time of actual payment, but it seems to the court that this would be a useless requirement. The objects of the protest are to define the taxpayer's attitude and to notify the government thereof. These have been fully accomplished by the objection of the taxpayer when the computation was made and by the filing of his claim."

The case of the petitioner is much stronger than that of the taxpayers in the above cases. There is nothing to indicate that the taxpayer in any of those cases referred to the previous protest at the time of payment, whereas in this case at the time of paying the tax, the petitioner expressly called the attention of the Collector to and re-affirmed its previous protest (R. 10). There can be no question as to whether the petitioner may or may not have acquiesced in the tax subsequent to its previous protests. The facts show that the petitioner did not acquiesce in it.

We take it that the word "specific" in the term "specific protest" above means to indicate that the protest should specify in detail the grounds of objection. This seems to be the view taken by this Court in the case of *Girard Trust Co. et al. v. United States* (270 U. S. 163) (5 Am. Fed. Tax Repts. 5846). The Court, speaking through Mr. Chief Justice Taft, stated:

"The government's contention is that the distinction made in section 1824, by which the interest to be paid on refunded taxes is to date from the payment of the taxes in cases where there is a specific protest setting forth in detail the basis and reasons for such protest, and by which the interest is to be dated only from six months after the date of filing the claim for refund or credit when there is no protest, was intended to favor those who furnished to the collecting officers by way of specific protest a valid basis for a refund of the taxes.

"We agree with this view. To hold otherwise would be to invite a protest on any pretended ground by taxpayers in every case of payment, and would make the protest of no value to the Treasury or the collecting officers. A protest is for the purpose of inviting attention of the taxing officers to the illegality of the collection, so that they may take remedial measures at once. But, if protests are based on reasons of no validity, they do not accomplish the public purpose for which they are devised."

The instant case certainly meets every test laid down by this Court in the above case. The petitioner furnished to the Collector a valid basis for the refund of its taxes. It invited the attention of the Collector to the illegality of the collection and furnished him data which would have enabled the Commissioner to have taken remedial measures at once, if he had been inclined to do so. *The fact that he waited almost four years before taking such remedial measures only emphasizes the justness of the petitioner's claim for interest.* It should be noted that when the Commissioner did act, he acted on the very grounds set out in the petitioner's protest. The following statement in the Certificate of Overassessment allowing the refund (Exhibit No. 7 of petition; R. 13) speaks for itself:

"You are advised that after careful consideration of all the facts, as set forth in the statements filed with your returns, together with other data submitted and in connection with the recommendation of the Committee on Appeals and Review, your excess profits tax has been computed under the provisions of Section 210 of the Revenue Act of 1917, and Articles 18, 24 and 52 of Regulations 41, which provide that an excess profits tax may be based upon a comparison with a group of concerns engaged in a like or similar line of business, which in their general character are comparable, as to the essential component parts influencing the tax liability, to your company.

"The result thus determined after giving effect to necessary changes in the net income, developed through audit of the returns, indicates an overassessment of

$462,038.34, specific details of which are as follows: * * *"

SUMMARY OF POINT I

The petitioner requested assessment under Section 210 of the Revenue Act of 1917. Surely this is a protest against assessment under sections 201 and 207, whether a protest be defined as

> "a solemn declaration of opinion" (Webster's Dictionary)

or as

> "a declaration of dissent from an act done or about to be done, made to prevent the inference that by such act the declarant has relinquished a debt or *accepted a liability.*"
> (Funk & Wagnall's New Standard Dictionary.)

Clearly, the assertion of a right to one form or rate of assessment is a protest against or objection to a different form or rate. A claim in abatement has been held to be a sufficient protest, although the word "protest" or "objection" is not used therein but only the word "requested," the very word used by this petitioner.

POINT II

The Court of Claims erred in holding that a protest based upon the right to special assessment under Section 210 of the Revenue Act of 1917 could not be a protest within the meaning of Section 1324 (a) of the Revenue Act of 1921.

The Court of Claims takes the view that a protest based on a claim for special assessment cannot be regarded as a real protest, because a protest against the Commissioner's conclusion or decision on the question of special assessment would be futile. The Court of Claims said in its opinion (R. 27):

"Section 210 is not a taxing statute, and a protest against the Commissioner's conclusion or decision under it would be futile, and, even if it were made, would not entitle the plaintiff to relief in this court on account of either failure to make a special assessment or from an assessment which had been made and was unsatisfactory to the taxpayer, or a refusal to make a special assessment or make any change with regard to the plaintiff's invested capital, leaving it as under the return."

As a matter of fact, the protest which the petitioner made was not a protest against the action of the Commissioner under Section 210. The protest which the petitioner made at the time of payment of the tax was against assessment under Sections 201 and 207 of the statute. It protested against assessment under Sections 201 and 207 and specified that it was entitled to assessment under Section 210. The protest was not against the determination of the Commissioner under Section 210 which had not yet been made, but for the purpose of requesting the Commissioner to make such determination.

And this protest was by no means futile, either in theory or in fact. The statute provided a specific and adequate remedy for those aggrieved under Sections 201 and 207, if they believed themselves to be within the provisions of Section 210. They had the right to appeal to the Secretary of the Treasury himself for the determination of their claim. This right of appeal has been successfully availed of by hundreds of taxpayers and has resulted in refund of millions of dollars of taxes. In the instant case, the protest against assessment under Sections 201 and 207 was in fact anything but futile. It was highly effective. It resulted in a favorable determination of its claim to special assessment by the tribunal appointed for that purpose by the statute, to wit: the Secretary of the Treasury, and the actual refund of $457,341.37 in taxes. It is indeed difficult to describe as futile that which produced such adequate and substantial results.

It is true that if the petitioner had protested against the

determination of the Commissioner *under Section 210*, as the Court of Claims apparently thought it did, such protest would have been futile *so far as affording a basis for suit in the Court of Claims*. But the petitioner was not protesting against such determination; it was protesting against assessment *under Sections 201 and 207* and with highly successful results. The Commissioner's discretion was exercised in its favor. He found the tax paid was excessive and that the petitioner was entitled to a refund. Against that decision the petitioner is not protesting in this Court. It is asserting that its tax having been found to have been overpaid, it is entitled to interest on the excessive amount withheld by the Government. Its right to such interest rests on Section 1324 of the 1921 Act and not on Section 210 of the 1917 Act.

The Court of Claims apparently assumes that the purpose of the protest required by Section 1324 (a) of the Revenue Act of 1921 was to lay the basis for suit. There is certainly no grounds for reading such a qualification into a term which has been used by Congress in a contrary sense for almost ninety years. Congress has consistently and repeatedly over a period of almost ninety years used the word "protest" in connection with claims which were not enforceable in court. Every tariff act since the Act of 1842 has made protest a condition precedent to the recovery of duties wrongfully collected. At the same time, every one of these tariff acts limited the right of recovery of duties in the case of erroneous appraisal to a proceeding before the statutory appraisers, with no right of appeal to the courts. Congress required a protest in these cases although forbidding suit. See *Bartlett* v. *Kane*, 16 How. 263, 272; *Hilton* v. *Merritt*, 110 U. S. 97, 105, and *Passavant* v. *U. S.*, 148 U. S. 214. The Court of Claims would now import to Congress, after almost ninety years of expressing a contrary intention, an intent that protest implies a right to court action.

This Court has itself explained the purpose of the protest required by Section 1324 (a) of the Revenue Act of 1921.

In the case of *Girard Trust Company* v. *United States*, supra, at page 172, Chief Justice Taft explained the term as follows:

> "A protest is for the purpose of inviting attention of the taxing officers to the illegality of the collection, so that they may take remedial measures at once."

There is no suggestion here that the protest must be upon some ground which would furnish the basis of a court action. It is submitted that the decision of the Court of Claims conflicts with the view taken by this Court in the *Girard Trust Company* case.

POINT III

The Court of Claims erred in holding that a claim for refund based upon special assessment under Section 210 of the Revenue Act of 1917 could not be a claim for refund within the meaning of Section 1324 (a) of the Revenue Act of 1921.

The Court of Claims also takes the view that the claim for refund referred to in Section 1324 (a) of the Revenue Act of 1921 must be a claim which is enforceable in court. It is submitted that there is no basis for this limitation. There is a wide variety of claims against the United States which are not enforceable in court, although they may be prosecuted before non-judicial tribunals. A claim for refund of taxes is but one form of claim against the government. No claim against a sovereign can be enforced except in the tribunal which the sovereign designates. The Court of Claims is but one of several tribunals which the United States in the exercise of its sovereign discretion has designated for the enforcing of claims against it. Some of these tribunals are judicial and some are administrative. Thus, claims for compensation under the Act of March 3, 1885, were held by this Court, in *United States* v. *Babcock*, 250 U. S. 328, to be enforceable only before the Treasury De-

partment. Claims for postal compensation under the Act of March 4, 1913, were held by this Court in *United States* v. *Atchison T. & S. F. Ry. Co.*, 249 U. S. 451, to be enforceable only before the Postmaster General. Claims for compensation under the War Risk Insurance Act were held by this Court in *Silberschein* v. *U. S.*, 266 U. S. 221, to be enforceable only before the Director of the Veterans Bureau. And claims for the recovery of duties paid based on erroneous appraisal are enforceable only before the appraiser. *Bartlett* v. *Kane, supra; Hilton* v. *Merritt, supra; Passavant* v. *United States, supra.*

The term "claim for refund" as used in other parts of the Revenue Act, and as universally understood by the Department and the taxpayers, includes a claim for refund based upon special assessment. Section 252 of the Revenue Act of 1921 provides a limitation of the time within which a refund may be made. This limitation is contained in the first proviso of that section, which reads as follows:

> "Provided, That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a *claim* therefor is filed by the taxpayer." (Italics ours.)

We feel safe in asserting that no one would ever suggest that the claim for refund referred to in this proviso does not include a claim for refund based upon special assessment under Section 210. The Department has regularly made refunds based upon special assessment after the period of limitations provided in the Revenue Act of 1921 and succeeding acts, if a claim for refund was filed within the period. The only basis upon which a refund may be granted after the expiration of the limitations period is that a claim for refund has been filed within the period. The universal practice of the Department in treating claims for refund based upon special assessment as real claims for refund within the meaning of Section 252 of the Revenue Act of 1921 and similar provisions of succeeding Acts is

persuasive authority. If the Court of Claims is correct that a claim for refund means a claim enforceable in court, the Treasury Department has refunded and is continuing to refund millions of dollars of taxes without authority and contrary to the statute.

POINT IV

The Court of Claims erred in holding that under the Williamsport Wire Rope case the Commissioner of Internal Revenue has an unreviewable discretion in passing upon claims for interest on refunds which have already been granted on the basis of special assessment.

The case of *Williamsport Wire Rope Company* v. *U. S.*, 277 U. S. 551, has no application to the question of the right of interest under Section 1324 (a). The Court of Claims erred in assuming that it has any effect, and the error at the basis of the Court's decision is largely summed up in the following quotation from the opinion of the Court (R. 29).

> "The Commissioner made a special assessment and allowed it a refund. He did not allow but refused interest, and the plaintiff here is in effect asking the court to increase the allowance of the Commissioner by allowing interest and passing upon his decision in a matter where his decision was final, and as to which this court has no jurisdiction. We think *we are precluded under the decision in the Williamsport Wire Rope Case, supra, from doing so*, as to do so would be to change the amount found by the Commissioner." (Italics ours.)

Of course petitioner is not seeking to change the amount of the refund found by the Commissioner to be due pursuant to Section 210. The Commissioner's action in determining, under Section 210 of the Revenue Act of 1917, the amount of an overassessment may be an administrative

matter involving such complications in presentation and proof as not to be generally subject to review by a court in suits for refund under the Court of Claims Act or the Tucker Act, or in a suit against a collector. But where the Commissioner has made such a determination, and as a result thereof and under the authority of other statutory provisions a refund has been made, as it has been made in this case, the question as to whether interest should be paid thereon, and if so in what amount, is governed by Section 1324 (a) of the Revenue Act of 1921.

The right to interest on the allowance of a claim for refund is a separate and self-subsisting right given by a statute enacted after, and independent, of, the Revenue Act of 1917 and Section 210 thereof. It is a right which continues to exist even when the right to the refund is extinguished by payment. *Girard Trust Company* v. *United States, supra.* It is not even like the right to interest which is incidental to taxes recovered from a collector, as in the case of *Stewart* v. *Barnes*, 153 U. S. 456 (1894). *Girard Trust Company* v. *United States, supra.* And the application of the statute giving this right involves none of the complicated administrative determinations involved in the application of Section 210. It is a pure question of statutory construction and simple arithmetic, once the amount of refund has been determined. The only possibility for the exercise of any administrative discretion comes in the allowance of the refund. Once the refund is allowed, the Commissioner has determined what amount of money was wrongfully withheld from the taxpayer by the Government. Congress has determined by clear and simple legislative enactment what the Government shall pay for the wrongful retention of this money. The allowance of interest under Section 1324 (a) of the Revenue Act of 1921 is just as simple a ministerial act where the refund is based upon special assessment as where it is based upon any other grounds, and would even be subject to the writ of mandamus. *Cf. Blair* v. *United States, ex rel, Birkenstock*, 271 U. S. 348 (1926).

POINT V

The Court of Claims has erroneously treated the right to interest under Section 1324 (a) of the Revenue Act of 1921 as merely an incident to the recovery of the principal amount of a refund, in direct conflict with the decision of this Court in the Girard Trust Company case.

The Court of Claims continues to entertain the old error which caused the reversal of its decision by this Court in the *Girard Trust Company* case. In the *Girard Trust Company* case, the Court of Claims held that a suit could not be maintained for the recovery of interest on a refund under Section 1324 of the Revenue Act of 1921, where the principal amount of the refund had been paid. The Court of Claims treated the right to interest as merely an incident of the right to recover the principal, relying upon *Stewart* v. *Barnes, supra.* When the right to the principal was extinguished by payment, the Court of Claims thought that no independent action could be maintained for the recovery of interest which was only incidental to the principal. In the case at bar, the Court of Claims falls into the same error by reasoning that, since the right to recover the principal amount of the refund could not be sued upon in court, an independent action for the recovery of interest, which is incidental to the principal, cannot be maintained. In the *Girard Trust Company* case an action could not have been maintained for the recovery of the principal for the reason that the right to the refund itself had been extinguished by payment. In the case at bar, an action could not have been brought in court for the recovery of the refund itself for the reason that the right was enforceable only before an administrative tribunal. In both cases the Court of Claims reasoned that since an action could not have been maintained in court for the recovery of the principal, an independent action could not be maintained for the recovery of the interest which the Court of Claims regarded as a

mere incident to the recovery of the principal. It is submitted that the Court of Claims in the case at bar has fallen into the same old error of treating the right to interest under Section 1324 of the Revenue Act of 1921 as merely incidental to the recovery of the principal amount of the refund. The failure of the Court of Claims to recognize that this Section creates a separate and independent right which gives rise to an independent action is in direct conflict with the decision of this Court in the *Girard Trust Company* case.

POINT VI

The Court of Claims erred in holding that the protest was not a protest against an illegal assessment and therefore was not a protest within the meaning of Section 1324 (a) (1).

The Court of Claims held that the taxes refunded were not illegally assessed and that for that reason there could be no valid and effective protest. This holding is expressed in the following language taken from the opinion of the Court:

> "It (petitioner) was granted a refund not because it would have been illegally assessed had the commissioner refused to grant it, because had he refused the plaintiff would have been without remedy, as the matter was within his discretion, even if it had filed a formal protest and a formal claim for a refund. * * *
>
> * * *
>
> A request for a special assessment, therefore, under these circumstances, does not convey the idea, the thought, or conviction that it was intended as or was a protest, or a claim for a refund, since it is clear that neither one would have been of any benefit to it as far as the decision of the commissioner was concerned.
>
> * * *
>
> * * * The plaintiff by the assessment under its return had not been illegally assessed as to its invested capital, for the decision of the commissioner was final and legal" (R. 28, 29).

The same idea seems to be expressed in the brief for the United States in opposition to the writ of certiorari. The following is taken from page 5 of the brief for the United States:

> "The letters merely request a hearing on a matter entirely within the Commissioner's discretion, on the ground that unless special assessment is given, it would be *unfairly but legally* bound to pay taxes disproportionate to the taxes of other companies in the same line of business." (Italics ours.)

Both the opinion of the Court of Claims and the brief for the United States in this Court assume that a valid protest exists only where the tax protested against is illegal.

We do not concede that a claim for refund or a protest within the meaning of Section 1324 (a) of the Revenue Act of 1921 involves any idea of illegality of the tax other than that on some ground some amount is legally refundable. Even granting, however, that the illegality of the tax refunded is an essential basis of a protest or a claim for refund within the meaning of Section 1324 (a), this element is present in the case at bar.

We submit that if a taxpayer was entitled to have its tax assessed under Section 210 of the Revenue Act of 1917 the collection of a greater amount of tax, assessed under Section 201 of the Revenue Act of 1917, was illegal. The contrary position which is taken by the Court of Claims and by the Solicitor General in his brief in this Court is due to a misunderstanding of the nature of Section 210 and of the decision of this Court in the *Williamsport Wire Rope case, supra.* The *Williamsport Wire Rope case* held that an action could not be maintained in the Court of Claims for the refund of taxes based upon Section 210 of the Revenue Act of 1917 (or Sections 327 and 328 of the Revenue Act of 1918). The application of Section 210 was thus left to the administrative discretion of the Commissioner. But it was not denied that a taxpayer had a legal right to special assessment where his case fell within

the provisions of Section 210. The enforcement of this legal right was simply left to an administrative tribunal rather than to a Court.

While there may be no right in a suit based upon a claim for refund to force the Commissioner to grant special relief under Section 210, the Act is mandatory upon him to do so in the proper case. Section 210 provides:

> "That if the Secretary of the Treasury is unable in any case satisfactorily to determine the invested capital, the amount of the deduction *shall be* the sum of (1) an amount equal to the same proportion of the net income of the trade or business received during the taxable year as the proportion which the average deduction * * * for the same calendar year of representative corporations, * * * engaged in a like or similar trade or business, bears to the total net income of the trade or business received by such corporations, etc." (Italics ours.)

It should be noticed that it is not provided that the Secretary or Commissioner *may* in his discretion grant special assessment. On the contrary the law declares that when a certain condition exists the amount of the invested capital deduction *shall be* computed in the manner specified. If the facts of a taxpayer's case bring it within the terms of this section, he is entitled legally, under this statutory provision, to special assessment. If the law gives him the right to special assessment, a greater amount of taxes collected from him on another basis is illegal and excessive. All that the *Williamsport Wire Rope case* holds is that the Commissioner or Secretary of the Treasury will generally have the final decision on the question whether a taxpayer is legally entitled to special assessment under this section, and, by the same step, whether the taxes collected without resort to Section 210 are excessive and illegal.

As was said by the Board of Tax Appeals in *Appeal of Davis & Andrews Co.*, 2 B.T.A., 328, after quoting Section 327 of the Revenue Act of 1918:

"In three of the four cases above, it is necessary for the Commissioner to determine certain facts which operate as conditions precedent to the application of Section 328, *but when these conditions precedent have been found by him the application of the statute is mandatory.* * * * Under these circumstances, we are of the opinion that, where the Commissioner has once found the antecedent circumstances, the provisions of Section 327 and 328 apply, and *the tax must be computed under the latter section.*" (Italics ours.)

The Government's argument really amounts to the proposition that since the Commissioner might have denied special assessment and decided that the taxes imposed under Section 201 were legally collected, no protest was possible. But this is a possibility which is present in every protest. The court, Commissioner or other tribunal which passes upon any protest or claim for refund may in any case deny the taxpayer's claim and hold that the taxes were legally collected. If the Government's reasoning is sound, there could never in any case be a valid protest against illegality because it may be ultimately determined by the Commissioner, judge or tribunal vested with final decision in the case that the taxes were not illegally collected!

CONCLUSION

The essence of the petitioner's case is this: Petitioner was compelled by law to make its return and pay its tax in the first instance under Section 201 of the Revenue Act of 1917. Article 24 of Regulations 41 of the Treasury Department provided:

"In every case of a trade or business having invested capital a return shall be made in the first instance in accordance with Article 21 or 23, but the taxpayer may submit therewith a statement of reasons why in his opinion the tax should be assessed in accordance with this article."

The obvious purpose of this regulation was to assess all

taxpayers having invested capital under Section 201, and to prescribe the sole method by which the taxpayer should protest against such assessment and give notice to the taxing officers of its claim to special assessment under Section 210, in order, to quote the language of this Court, that the taxing officers might "take remedial measures at once."

The petitioner complied scrupulously with these regulations. It made its return under Section 201, submitted therewith a statement of reasons why in its opinion it should be assessed under Section 210 rather than Section 201 and requested such assessment. It was assessed under Section 201 and paid its tax thereunder, at the same time repeating its protest against such assessment under Section 201 by again requesting assessment under Section 210.

This course of action constituted a complete and exact compliance with the definition and requirements of protest as prescribed by the Treasury Department in its own regulations and by this Court in the *Girard Trust Company* case, *supra*.

The protest was the foundation of a claim against the Government—a claim for special assessment under Section 210. The Secretary of the Treasury was designated by Congress as the tribunal before whom such claims should be decided. The Secretary of the Treasury entertained the claim, decided in favor of the plaintiff and allowed a refund.

There is not a word in Section 1324 (a) expressly stating or even indicating that the "claim for the refund" referred to must be enforceable in court. Such a conclusion cannot be implied. Congress has repeatedly and consistently in all tariff acts since 1842 required protest in connection with claims for the refund of taxes reviewable by an administrative tribunal and not enforceable in court. To now hold that Congress, in using the word "protest" in Section 1324 (a) in connection with claims for the refund of taxes, intended to exclude all claims not enforceable in court is to run directly counter to the intention and meaning of Congress continuously expressed over a period of almost ninety years.

It is, therefore, respectfully submitted that this case should be remanded to the Court of Claims with instructions to enter judgment therein for the petitioner for interest on the sum of $457,341.37 at the rate of 6 per cent per annum from the date on which the petitioner's 1917 income and excess profits taxes were paid to the date on which said taxes were in part refunded to the petitioner.

Respectfully submitted,

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(EXECUTE SEPARATE FORM FOR EACH TAX PERIOD) "Exhibit A"

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
Form 843 (Rev. ...)
Comptroller General U.S.
January 16, 1959

IMPORTANT
File with Collector of Internal Revenue whose assessment upon which. Not acceptable unless completely filled in.

CLAIM FOR

- [X] ABATEMENT OF TAX ASSESSED
- [ ] CREDIT AGAINST OUTSTANDING ASSESSMENTS
- [ ] REFUND OF TAXES ILLEGALLY COLLECTED
- [ ] REFUND OF AMOUNTS PAID FOR STAMPS USED IN ERROR OR EXCESS

COLLECTOR'S NOTATION
Dated
Amount number
Date received
Collector of Internal Revenue

District of ...
County of ... ss:

NOTICE TO COLLECTOR
Collector must indicate in block given the kind of claim, namely, to whom the claim.

Date received by Collector, U.S.
Stamp here

TYPE OR PRINT

(Name of taxpayer or purchaser of stamps.)

(Residence—give street and number as well as city or town and State.)

(Business address.)

This document, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

PERIOD	YEAR
From	19..
To	19..

1. Business in which engaged ...
2. Character of assessment or tax ...
(If tax or upon which the tax was assessed, or the stamps affixed.)
3. Amount of assessment or stamps purchased ... $
4. Reduction of Tax Liability requested (Income and Profits Tax) ... $
5. Amount to be abated ... $
6. Amount to be refunded (or such greater amount as is legally refundable) ... $
7. Date of payment (see Collector's receipts or Independents of canceled checks) ...
(If statement covers income tax liability, items 8-11, inclusive, must be answered.)
8. District in which return (if any) was filed ...
9. District in which unpaid assessment appears ...
10. Amount of overpayment claimed as credit ... $
11. Unpaid assessment against which credit is asked; period from ... to ... $

Deponent verily believes that this application should be allowed for the following reasons:

(Attach additional sheets if necessary.)

Sworn to and subscribed before me this ... day

Signed

of ..., 19..

(Title.)

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue or Revenue Agent without charge.)